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No. 02-333

IN THE

Supreme Court of the United States

TCI MEDIA SERVICES, GREAT NORTHWEST REGION, an entity of unknown type; TCI MEDIA SERVICES, BOISE, an entity of unknown type; UNITED CABLE TELEVISION CORP., a Delaware corporation; TCI COMMUNICATIONS, INC., a Delaware corporation; TELE-COMMUNICATIONS, INC., a Delaware corporation; BRUCE WETTEN, an individual; and EDWARD MOORE, an individual,

Petitioners,

v.

PATRICIA A. COLE; CATHY LEAL; and BECKI TRUEBLOOD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Petitioners refer and incorporate their prior Corporate Disclosure Statement at page iii of the Petition for Writ of Certiorari.

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The Respondents, plaintiffs below, argue that two issues of fact preclude a writ of certiorari. This Reply shows that the material facts are undisputed.[1]

[1] Respondents' Brief was due on October 4, 2002. Petitioners did not receive Respondents' Brief until October 11, 2002, and the only proof of service Respondents have been given is an Amended Proof of Service, which reflects a service date of October 7, 2002.

A. By and Through Their Attorneys, Plaintiffs Directed the EEOC to Defer Their Charges to the Seattle Office for Civil Rights

Plaintiffs argue that they did not direct the Equal Employment Opportunity Commission ("EEOC") to defer their charges to the Seattle Office for Civil Rights ("Seattle OCR"). Plaintiffs say the charge forms in the Petition's Appendix (*see* Apps. G-I; 27a-29a) were drafted by the EEOC; that the EEOC deferred to the Seattle OCR and plaintiffs had nothing to do with that decision. The record contains undisputed proof that plaintiffs, by and through their attorneys, directed the EEOC to defer their charges to the Seattle OCR.

1. Admissions of Plaintiffs' Counsel

Plaintiffs' counsel has admitted that his office filled out the charge forms, including specifically the request for deferral to the Seattle OCR. For example, at plaintiff Cathy Leal's deposition, she was handed her signed charge form, Deposition Exhibit No. 15 (ER 001611):[2]

> Q This indicates at the top that it was also filed with the Seattle Office for Civil Rights.
>
> Why, if you know, was it filed with the Seattle Office for Civil Rights?
>
> MR. SIMONCINI: I object. It is beyond this witness's expertise. *Her attorneys filed this.* She signed and *we filled it out.*

(1sa,[3] Deposition of Cathy Leal at 151, District Court CR 47, Affidavit of Gregory C. Tollefson in Support of Motion for Summary Judgment ("Tollefson Aff."), Exh. C at 39 (emphasis added).)

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[2] (*Cf.* 27a, App. G to the Petition, Leal's charge form with "Received" stamp from EEOC.)

[3] All "__sa" references herein are to the Supplemental Appendix to this Reply.

Plaintiffs' counsel made the same representation when plaintiff Becki Trueblood was presented with her signed charge form, Deposition Exhibit 173 (ER 001616):[4]

> Q And this appears to be a charge of discrimination that was to be filed with the EEOC and the Seattle Office for Civil Rights?
>
> MR. SIMONCINI: I'm going to object. It's a legal document *filled out by her lawyers* filed on her behalf. Ms. Trueblood was requested to sign it which she did at the instructions of her Counsel. She has no knowledge as to the content nor did she participate in writing any of the content.

(3sa, Deposition of Becki Trueblood at 72, Tollefson Aff., Exh. D at 19 (emphasis added).)[5]

Of equal relevance is plaintiff counsel's December 31, 1997 letter to the EEOC on behalf of plaintiff Patricia Cole, which states: "We also request that the charge also be filed with the Seattle Office for Civil Rights, and not the Idaho State Human Rights Commission." (36a, App. M of the Petition's Appendix.)

2. Admission in Ninth Circuit Briefing

In their Opening Brief, plaintiffs told the Ninth Circuit that they chose to defer to the Seattle OCR: "*Appellants filed both local (Seattle Office of Civil Rights)* and federal (EEOC) *administrative claims* against [Respondents]. . . ." (Appel-

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[4] (28a, App. H to the Petition.)

[5] The EEOC form letters cited at 15a–18a in the Appendix to Respondents' Brief state that the charges were "drafted as a result of the information you provided." Such boilerplate language is used because, as the letters indicate, the charge can be prepared based on a "telephone call/mail inquiry." (*Id.*)

lants' Opening Brief, filed with the Ninth Circuit on April 18, 2001 ("Appellants' Opening Brief"), at 6 (emphasis added).)[6]

3. Plaintiffs Failed to Inform the EEOC that Deferral to the Seattle OCR Was Incorrect

Even if plaintiffs had not directed the EEOC to defer to the Seattle OCR, plaintiffs were represented at all relevant times by counsel who knew or should have known that the proper agency for deferral was the Idaho Human Rights Commission. The EEOC form letters cited by plaintiffs state that the attached charge form is based on "information you provided." (*See e.g.*, Appendix to Respondents' Brief at 17a.) Because plaintiffs' attorneys never informed the EEOC that it had deferred to the wrong local agency, plaintiffs are responsible for failing to exhaust their administrative remedies, and their charges were thus never "filed" with the EEOC. *See Cornett v. AVCO Financial Services*, 792 F.2d 447 (4th Cir. 1986) (ADEA claim dismissed for failure to exhaust administrative remedies where EEOC mistakenly forwarded charges to wrong FEP agency, and plaintiff had notice but failed to correct the error).

B. The Seattle OCR Had No Jurisdiction

Plaintiffs' second contention is that the Seattle OCR had jurisdiction to investigate their claims and exhaust their administrative remedies.[7] The undisputed facts show that the Seattle OCR had no jurisdiction.

Plaintiffs make two arguments. First, they claim their supervisor in Idaho (Bruce Wetton) failed to report discriminatory conduct to his supervisor in Seattle. (Respondents'

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[6] All parenthetical text from this quote, including the reference to the "(Seattle Office of Civil Rights)" is in plaintiffs' original.

[7] *See* 42 U.S.C. § 2000e-5(c) (Title VII) and 29 U.S.C. § 633(b) (Age Discrimination in Employment Act).

Brief at 2-3.) Second, plaintiffs say they reported discrimination to Seattle supervisors Kerin Brasch and Penny Taylor, who then allegedly failed to take action. (*Id.*) Even if true, these allegations fail to show the Seattle OCR had jurisdiction.

1. Plaintiffs' Charges and Claims Are Not Based on Any Acts or Omissions in Seattle

Plaintiffs unequivocally admitted below that they were asserting no charges or claims based on acts or omissions by Seattle office personnel:

> "All Plaintiffs have conceded that their entire employment with TCI Media Services took place in Idaho, that they were hired and employed for the entire duration of their employment in the Boise, Idaho office, that they were never employed in Washington or any other state. (Ex. 26 at Responses 2-4) Consequently, *all of the alleged claims in the Complaint and in Plaintiffs' EEOC charges were based entirely on acts that took place in Idaho if they occurred anywhere.*

(24a, App. F to the Petition, Paragraph No. 1 of Defendants' Statement of Material Facts, filed January 28, 2000 (emphasis added).) Respondents' Brief repeatedly refers to what plaintiffs construe as the Seattle office's ratification of Idaho discrimination or failure to act on reports of discrimination in Idaho. What they fail to explain, however, is how any of this is relevant, given their unqualified admission that "all" of their claims and charges were based "entirely on acts that took place in Idaho." (*Id.*) Given that admission, any acts or omissions within the Seattle office are immaterial.

Plaintiffs' intent to base their charges solely on Idaho conduct is further demonstrated by the previously noted

explanation they gave the Ninth Circuit for deferring to the Seattle OCR, which has nothing to do with any conduct or inaction by Seattle supervisors:

> Appellants filed both local (Seattle Office of Civil Rights) and federal (EEOC) administrative claims against TCI Media Services, Bruce Wetten and Edward Moore, with the State of Washington as they had a good faith belief that relevant employment records were maintained and administered at TCI Media Services, Great Northwest Region, located in Seattle, Washington. (ER 282-284, 538-541, 928, 935-36.)

(Appellants' Opening Brief at 6.)[8]

As to Wetten, plaintiffs' argument relies not on discriminatory actions in Seattle, but rather on omissions in Idaho. Any actionable failure of Wetten to report discrimination to Seattle was an omission that took place *in Idaho*. The Fair Employment Practices Ordinances in the Seattle Municipal Code ("SMC") do not apply to someone located *in Idaho* who fails to report allegedly discriminatory actions that took place *in Idaho*. *See* SMC § 14.04.040 ("It is unfair employment practice *within the City* for any: . . . Employer to discriminate against any person with respect to . . . .") (emphasis added); and SMC § 14.04.060 (". . . The Office for Civil Rights shall receive, investigate, and pass upon charges alleging unfair practices *as defined by this chapter* . . . .") (emphasis added). Respondents' Brief ignores the applicable provisions of the SMC.

Plaintiffs argue the Seattle OCR had authority to investigate how Seattle supervisors Taylor and Brasch "personally responded" to reports they allegedly received from plaintiffs of discrimination in Idaho. (Respondents' Brief at 6.) Unfair employment practices by a "person" under SMC

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[8] Plaintiffs' employment records were not kept in Seattle, of course, but in Idaho where they were employed.

§ 14.04.040(I) are defined in terms of intentional misconduct in the form of affirmative actions, not negligent omissions.[9] Furthermore, plaintiffs ignore SMC § 14.04.040, which limits the scope of prohibited "unfair employment practice[s]" to those "within the City[.]" The alleged failure of Brasch and Taylor to take action *in Idaho*, to remedy discrimination *in Idaho*, does not constitute an "unfair employment practice" under the SMC. The Seattle OCR, therefore, had no "authority to grant or seek relief" from the discrimination alleged, which took place entirely in Idaho. 42 U.S.C.A. § 2000e-5(c); 29 U.S.C.A. § 633(b).

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[9] SMC § 14.04.040(I) provides in relevant part:

It is an unfair employment practice within the City for any:

. . . . .

I. Person to:

1. Knowingly an willfully aid, abet, initiate, compel or coerce the doing of any act declared in this chapter to be an unfair employment practice; . . . .
2. Obstruct or prevent any person from complying with the provisions of this chapter,
3. Attempt directly or indirectly to commit any act declared by this section to be an unfair employment practice.

CONCLUSION

Petitioners respectfully urge the Court to grant their Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

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October 22, 2002

SUPPLEMENTAL APPENDICES

SUPPLEMENTAL APPENDIX A

DEPOSITION OF CATHY LEAL
TAKEN ON JULY 28, 1999

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* * * *

[Page 151] Q And what was her job?

A She was in production.

(Whereupon, Deposition Exhibit No. 15 was marked for identification.)

BY MR. CHANDLER:

Q I have handed you Deposition Exhibit 15.

Is that your signature down at the bottom left-hand corner?

A Yes, it is.

Q And the date appears to be November 8 of 1997. Do you recall that being about the time you signed this?

A I believe so.

Q Were you living in Idaho at that time?

A Yes.

Q This indicates at the top that it was also filed with the Seattle Office for Civil Rights.

Why, if you know, was it filed with the Seattle Office for Civil Rights?

MR. SIMONCINI: I object. It is beyond this witness's expertise. Her attorneys filed this. She signed and we filled it out.

BY MR. CHANDLER:

Q Do you know why it was filed with Seattle?

[Page 152] MR. SIMONCINI: Do you have an independent recollection as to why it was filed in Seattle?

THE WITNESS: No.

BY MR. CHANDLER:

Q And do you know why the Seattle address for TCI was used rather than—well, I'll withdraw that question. Why did you not file a charge with the Idaho Human Rights Commission?

MR. SIMONCINI: I'm going to object. It is beyond the scope of this witness's expertise. Her attorneys made the determination of where to file. If you have independent recollection, tell him.

THE WITNESS: No.

BY MR. CHANDLER:

Q Did you file any earlier charges against TCI either with the EEOC or with the State of Idaho?

A No. Not that I'm aware of.

Q Then the second page appears to be a declaration. Did you sign that second page in conjunction with the filing with the EEOC?

MR. SIMONCINI: Objection. Beyond the scope of this witness's expertise. Do you know if you did it in conjunction

* * * *

SUPPLEMENTAL APPENDIX B

BECKI TRUEBLOOD

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* * * *

[Page 72] Q Did you tell him anything about Fisher's—

A No.

Q —Office Supplies?

A No.

Q Was Fisher's Office Supply an account that you handled for TCI?

A No.

Q Did somebody else handle it?

A I'm sure they did. I don't remember who.

(Deposition Exhibit 173 was marked for identification.)

Q (By MR. CHANDLER) Exhibit 173, is that your signature at the bottom of that?

A Yes.

Q And this appears to be a charge of discrimination that was to be filed with EEOC and the Seattle Office for Civil Rights?

MR. SIMONCINI: I'm going to object. It's a legal document filled out by her lawyers filed on her behalf. Ms. Trueblood was requested to sign it which she did at the instructions of her Counsel. She has no knowledge as to the content nor did she participate in writing any of the content.

Q (By MR. CHANDLER) Ms. Trueblood, did you read the paragraphs in the middle of that form before you [Page 73] signed it?

A I don't recall.

Q Do you remember whether anything was completed in that section, or did you sign it in blank?

A I don't recall. I'm sorry, I don't.

Q During the time that you worked for TCI, did you work in the State of Washington at all?

A During—excuse me?

Q During the time that you were employed by TCI, did you work in the State of Washington?

A No.

Q Working for TCI.

A Right. I handled accounts that were based there, but I didn't work in the State of Idaho.

Q Excuse me?

A Actually that's not true. Forget I said what I just said.

Q Well, you said something—

A You can't say that because—okay.

Q Well, you said something about handling accounts.

A What I meant by that was, we never knew exactly where the base was of some of the accounts. Like, say, QZAR was my account. The headquarters of QZAR could have been in Washington, that type of thing.

* * * *